

APPEAL NO. 161870
FILED NOVEMBER 8, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 13, 2016, in (city), Texas with hearing officer presiding as hearing officer. The hearing officer resolved the disputed issues by determining that: (1) the (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear; (2) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on December 11, 2015; and (3) the claimant's impairment rating (IR) is 15%. The hearing officer also determined that the appellant/cross-respondent (carrier) is not entitled to a reduction of the claimant's impairment income benefits (IIBs) based on contribution from an earlier compensable injury.

The carrier appealed the hearing officer's MMI and IR determinations, contending that the evidence does not support those determinations. The carrier also appealed the hearing officer's determination that the carrier is not entitled to a reduction of the claimant's IIBs based on contribution from an earlier compensable injury. The carrier contends that the issue of contribution was not requested by either party and was not actually litigated at the CCH. The appeal file does not contain a response from the claimant to the carrier's appeal. The claimant cross-appealed the hearing officer's extent of injury, MMI, and IR determinations, contending that the evidence does not support those determinations. The carrier responded, urging affirmance of the extent-of-injury determination.

DECISION

Affirmed in part, reformed in part, and reversed by striking in part.

The claimant testified he injured his left shoulder when he lifted a Prius car battery. The parties stipulated, in part, that the claimant sustained a compensable injury at least in the form of a left shoulder sprain/strain and a cervical sprain/strain.

STIPULATION CORRECTIONS

The parties stipulated the following at the CCH: on (date of injury), the claimant was the employee of (employer); on (date of injury), the employer provided workers' compensation insurance with, (carrier); and on (date of injury), the claimant sustained a compensable injury at least in the form of a left shoulder sprain/strain and a cervical sprain/strain. However, Finding of Fact No. 1. B., C., and D. all incorrectly state a date of May 17, 2016, rather than the stipulated date of (date of injury). We reform Finding of

Fact No. 1. B., C., and D. to state the correct date of (date of injury), as stipulated by the parties.

The parties also stipulated that the referral doctor, (Dr. C), certified that the claimant reached MMI on December 11, 2015, and she assigned a 15% IR. In evidence is Dr. C's Report of Medical Evaluation (DWC-69) listing an MMI date of December 11, 2015. However, Finding of Fact No. 1. F. incorrectly states that Dr. C certified the claimant reached MMI on December 1, 2015. We reform Finding of Fact No. 1. F. to state the correct date of December 11, 2015.

EXTENT OF INJURY

The hearing officer's determination that the (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear is supported by sufficient evidence and is affirmed.

MMI/IR

We note the carrier correctly contended in its appeal that the hearing officer incorrectly stated that (Dr. N), the post-designated doctor required medical examination doctor, considered the noncompensable left shoulder rotator cuff tear in his MMI/IR certification. The hearing officer found that the MMI/IR certification from (Dr. R), is not contrary to the preponderance of the other medical evidence, and therefore determined that the claimant reached MMI on December 11, 2015, with a 15% IR. The hearing officer's MMI/IR determinations are supported by the evidence and are not reversible. Accordingly, we affirm the hearing officer's determinations that the claimant reached MMI on December 11, 2015, with a 15% IR as certified by Dr. R, the designated doctor.

CONTRIBUTION

The hearing officer noted in the Statement of the Case portion of the decision that:

At the request of the [c]arrier and for good cause, the following issue was added:

4. Is the [c]arrier entitled to a reduction of the [c]laimant's [IIBs] based on contribution from an earlier compensable injury, and if so, by what proportion?

The hearing officer determined that the carrier is not entitled to a reduction of the claimant's IIBs based on contribution from an earlier compensable injury. The carrier contends on appeal that it never requested the addition of this issue and that the parties never actually litigated the issue at the CCH.

In the recording of the July 13, 2016, CCH, the parties agreed the following issues as contained on the Benefit Review Conference (BRC) Report were the issues to be litigated at the CCH:

1. Does the compensable injury of (date of injury), extend to and include a left shoulder rotator cuff tear?
2. Has the claimant reached [MMI], and if so, on what date?
3. If the claimant has reached [MMI], what is the [IR]?

We note that in evidence is a Carrier's Response to Benefit Review Officer's Report dated June 14, 2016, which states the following:

At the [BRC] held May 17, 2016, the [c]arrier's representative specifically requested that the issue of contribution be added for the [CCH]. The [BRC] Officer responded that the issue of contribution was not a separate issue for a CCH determination and could not be added. The [c]arrier asserts that it does not waive its request to seek contribution in the event that the [h]earing [o]fficer adopts an [IR] which includes an impairment from the [c]laimant's prior workers' compensation injury for which he was awarded a 3% [IR] for lost range of motion. Once the final [IR] in the current claim is determined, the [c]arrier intends to seek contribution for the compounded effect of the prior injury. If contribution is a separate issue for a CCH, the [c]arrier requests that the issue be set for a determination because it was raised at the [BRC].

The carrier's response to the BRC Report was not discussed at the CCH, and neither party requested that the contribution be added as an issue at the July 13, 2016, CCH. Although the carrier argued in part at the CCH for the adoption of one of the MMI/IR certifications from Dr. N, which subtracted the 3% IR awarded for the previous compensable injury, the issue of contribution itself was not actually litigated at the CCH.

We review the hearing officer's ruling to add an issue on an abuse-of-discretion standard, that is, whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 031719, decided August 11, 2003, *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986).

Section 410.151(b) provides that an issue that was not raised at a BRC may not be considered unless the parties consent or the Texas Department of Insurance, Division of Workers' Compensation determines that good cause existed for not raising the issue at the BRC. Rule 142.7(a) provides, in part, that a dispute not expressly

included in the statement of disputes will not be considered by the hearing officer. Rule 142.7(c) provides, in part, that a party may submit a response to the disputes identified as unresolved in the benefit review officer's report in writing no later than 20 days after receiving the benefit review officer's report. Rule 142.7(d) provides, in part, that the parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. Rule 142.7(e) provides:

Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow such amendment only on a determination of good cause.

The Appeals Panel has strictly applied Rule 142.7 unless there is a knowing waiver of its provisions by both parties. APD 93593, decided August 31, 1993. See *also* APD 081791, decided February 12, 2009.

In this case the hearing officer abused her discretion in adding the contribution issue. The issue was not certified out of the BRC, neither party requested the issue be added at the CCH, and the issue of contribution itself was not actually litigated at the CCH. Accordingly, we reverse the hearing officer's decision by striking the determination that the carrier is not entitled to a reduction of the claimant's IIBs based on contribution from an earlier compensable injury.

SUMMARY

We reform Finding of Fact No. 1. B., C., and D. to state the correct date of (date of injury), as stipulated to by the parties.

We reform Finding of Fact No. 1. F. to state the correct date of December 11, 2015, as stipulated to by the parties.

We affirm the hearing officer's determination that the (date of injury), compensable injury does not extend to a left shoulder rotator cuff tear.

We affirm the hearing officer's determination that the claimant reached MMI on December 11, 2015.

We affirm the hearing officer's determination that the claimant's IR is 15%.

We reverse the hearing officer's decision by striking the determination that the carrier is not entitled to a reduction of the claimant's IIBs based on contribution from an earlier compensable injury.

The true corporate name of the insurance carrier is **SAFETY NATIONAL CASUALTY CORPORATION** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge